some lower point, it is not abandoned.[8] It may even be discharged into a stream as a link in a ditch line and taken out again, though there are prior appropriators or existing riparian owners on the same stream.[9]

Recognition of the continued ownership of the oil, notwithstanding it has left the original owner's actual possession, does not affect the riparian proprietor's right to divert the water on which the oil flows for riparian purposes. The ownership of the oil is clearly subject to the burdens to which its owner allowed it to become subject by placing it in the stream. One of these is that it may be diverted in whole or in part by a riparian proprietor in the exercise of his unquestioned privilege of using the water of the stream. But because it may cease to be his property by the lawful acts of the riparian proprietor is no more a reason for denying it that character until those acts are performed than it is for denying to the householder property in his furniture for the reason that the public authorities may destroy it in preventing the spread of a conflagration, or for denying to a farmer the ownership of his land because a railroad may take it under proceedings in eminent domain. When the court says in the principal case that to allow the agreement validity would prevent riparian proprietors "from diverting a single drop of water" because any diversion "would deprive the purchaser of the floating oil of a portion of his right," it is assuming that ownership necessarily embraces an absolute or unlimited right. Such an absolute right would, as von Ihering points out, result in the dissolution of society. It is hostile to the very notion of society on which property depends. Individual property cannot be defined save in terms of its social side.[10] *R. H. M.*

MORTGAGES: ASSUMPTION OF MORTGAGE DEBT BY GRANTEE OF MORTGAGED PREMISES: NECESSITY FOR EXPRESS PROMISE—Dicta are never desirable. And now, since most of our legal work is done under pressure and at high speed, and the busy practitioner (or his inexpert clerk) is prone to seize upon and quote any clear and succinct statement printed in the reports, a dictum may be dangerously misleading. The treatment accorded an oft-repeated dictum of long standing, in the case of *White v. Schader*[1] illustrates strikingly this danger.

If, upon foreclosure of a mortgage, the sale of the property fails to yield a sum sufficient to pay the mortgage debt, the mort-

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[8] 1 Wiel, Water Rights in the Western States (3d ed.) § 38; Lower Tule etc. Co. v. Angiola etc. Co. (1906) 149 Cal. 496, 86 Pac. 1081; Wutchuma Water Co. v. Pogue (1907) 151 Cal. 105, 111, 91 Pac. 362.

[9] Cal. Civ. Code, § 1413.

[10] Ely, Property and Contract in their Relation to the Distribution of Wealth, I, 137.

[1] (Feb. 10, 1920) 31 Cal. App. Dec. 457. Hearing in Supreme Court granted. Pending.

gagee is entitled to a deficiency judgment.[2] In case the mortgaged premises have been sold, the liability for this deficiency continues solely upon the mortgagor unless the grantee has agreed to pay it.[3] In fact, the authorities are unanimous that the obligation does not rest upon the grantee unless he has assumed it;[4] but it is not always clear just what amounts to an assumption. For instance, the acceptance of a deed which conveys the property "subject to" a mortgage will not make the grantee liable;[5] whereas if the words are "subject to the payment of" a mortgage, the grantee should be held liable.[6]

In deciding the case of Hopkins v. Warner,[7] where "the terms used by the parties to the agreement . . . . indicated clearly an intention . . . . to assume the mortgage debt," the Supreme Court interposed as pure dictum the assertion: "It is not necessary that there should be a formal promise on the part of the grantee, to pay the mortgage debt, in order to render him liable therefor, if his intention to assume the debt appears from a consideration of the entire instrument. The obligation may be made orally or in a separate instrument; *it may be implied from the transaction of the parties, or it may be shown by the circumstances under which the purchase was made,* as well as by the language used in the agreement. I Jones on Mortgages, Sec. 748; Canfield v. Shear (1882) 49 Mich. 313; Heid v. Vreeland (1879) 30 N. J. Eq. 591." (Italics ours.)

The authorities support the dictum in holding that no particular form of words is necessary to create a binding assumption.[8] If the grantor was liable,[9] any language which shows unequivocally a clear intent on the part of the grantee to assume the mortgage debt is sufficient.[10] But a carefuly study of the authorities cited fails to reveal the support for the part of the dictum we have italicized. The section from Jones on Mort-

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[2] Cal. Code Civ. Proc. § 726.

[3] 27 Cyc. 1343; L. R. A. 1917C 592, note; Ward v. De Oca (1898) 120 Cal. 102, 105, 52 Pac. 130; McArthur v. Goodwin (1916) 173 Cal. 499, 505, 160 Pac. 679.

[4] 27 Cyc. 1344; L. R. A. 1917C 592, note; Hibernia Sav. etc. Soc. v. Dickinson (1914) 167 Cal. 616, 621, 140 Pac. 265; McArthur v. Goodwin, supra, n. 3.

[5] Hibernia Sav. etc. Soc. v. Dickinson, supra, n. 4; Andrews v. Robertson (1918) 177 Cal. 434, 439, 170 Pac. 1129. A conveyance "subject to" a mortgage makes the property the primary fund out of which the mortgage is to be satisfied; but this is very different from the fixing of a personal liability upon the grantee. Lewis v. Day (1880) 53 Iowa 575, 577, 5 N. W. 753.

[6] Carley v. Fox (1878) 38 Mich. 387; Burbank v. Roots (1894) 4 Colo. App. 197, 35 Pac. 275; Jager v. Vollinger (1899) 174 Mass. 521, 55 N. E. 458.

[7] (1895) 109 Cal. 133, 137, 138, 41 Pac. 868.

[8] 3 Pomeroy's Equity Jurisdiction, 2877, § 1206; Belmont v. Coman (1860) 22 N. Y. 438, 78 Am. Dec. 213.

[9] Ward v. De Oca, supra, n. 3.

[10] 27 Cyc. 1344; 3 Pomeroy's Equity Jurisdiction, 2877, § 1206. "This liability results from the familiar doctrine in equity that a creditor is

gages is precise in its insistence that "there must be such words as will clearly import that the grantee assumed the obligation of paying the debt"; Canfield v. Shear turned on a question of agency, the court finding a clear understanding between the grantor and the grantee's agent that the obligation was to be assumed; and Heid v. Vreeland represents the rule of some jurisdictions which hold that a grantee who, having agreed to pay the full value of the premises, retains out of the consideration the amount of the mortgage debt, is bound to pay the mortgage debt when due.[11] This being clearly a promise to pay the full value of the property differs inherently from a situation like that under consideration here, where the grantee has merely promised to take the premises subject to the mortgage and to pay the difference between the value of the property and the amount of the mortgage debt. And, since the Supreme Court has said that a statement in a deed that property is conveyed subject to the mortgage would not import an assumption of the mortgage by the grantee, "even if the deed had recited as consideration the full value of the land as estimated in the purchase,"[12] it is clear that the rule of Heid v. Vreeland is not the law in California.

As might be expected, because of its positive tone and its apparent convenience and simplicity, the dictum in Hopkins v. Warner has been referred to frequently.[13] But it has never been followed. In Hibernia Savings and Loan Society v. Dickinson[14] the court held the grantee not liable to pay the mortgage debt; Dodds v. Spring [15] and Arp v. Ferguson[16] make it clear that nothing short of an actual promise will render the grantee liable; and in Dutton v. Locke-Paddon,[17] there was a clear covenant in the deed by which the grantee assumed the payment of the note.

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entitled to the benefit of all securities or collateral obligations that his principal debtor may have given to the surety for the payment of the debt. By the conveyance of the mortgaged premises and the assumption of the mortgage debt by the grantee, the latter, as between him and his grantor, becomes primarily liable to the mortgagee, and his vendor becomes his surety." Williams v. Naftzger (1894) 103 Cal. 438, 440, 37 Pac. 411. Since the grantee, by assuming the obligation, becomes the principal debtor, his promise is not within the Statute of Frauds; but in Pennsylvania the personal liability of the grantee can be created only by an agreement in writing. Woodrow's Estate (1891) 144 Pa. St. 198, 22 Atl. 810.

[11] 27 Cyc. 1349, 1354; L. R. A. 1917C 592, note, 594; Heid v. Vreeland (1879) 30 N. J. Eq. 591; Winans v. Wilkie (1879) 41 Mich. 264, 1 N. W. 1049; Siegel v. Borland (1901) 191 Ill. 107, 60 N. E. 863.

[12] Hibernia Sav. etc. Soc. v. Dickinson, supra, n. 4.

[13] Hibernia Sav. etc. Soc. v. Dickinson, supra, n. 4, at 622; Dodds v. Spring (1917) 174 Cal. 412, 416, 163 Pac. 351; Arp v. Ferguson (1917) 175 Cal. 646, 648, 166 Pac. 803; Andrews v. Robertson, supra, n. 5; Dutton v. Locke-Paddon (1918) 37 Cal. App. 693, 695, 174 Pac. 674; White v. Schader, supra, n. 1, at 459.

[14] Supra, n. 4, at 624.

[15] Supra, n. 13, at 415.

[16] Supra, n. 13.

[17] Supra, n. 13, at 694.

In Andrews v. Robertson,[18] the court refused to recognize evidence of an express promise to assume the obligation on the ground that there could be no consideration for a promise made after the execution of the agreement. The parol evidence rule was invoked in the principal case,[19] where the District Court of Appeal held that, although a positive stipulation in a deed is not essential to create a personal liability in the event of a sale of real estate encumbered by a mortgage, the dictum of Hopkins v. Warner is not applicable, in the absence of fraud or mistake, where the parties have reduced their agreement to writing.

It seems clear that the dictum in question, in spite of the fact that it has been referred to in the reports a half dozen times,[20] has been quoted verbatim three of those times,[21] and has found its way into a general collection of annotated cases as a statement of a peculiar rule recognized in California,[22] is not the law of California; and it may be expected that when the point comes up squarely for decision, the Supreme Court will overrule this oft-repeated assertion. In the meantime, careful grantors of mortgaged property will insert in their deeds or in the agreement which recites the terms of the transaction a clear and concise statement that the grantee agrees to pay the mortgage debt and to indemnify and save the grantor harmless therefrom.

R. V.

TORRENS LAW: MANDATORY CHARACTER OF PROVISIONS: FAILURE TO PROTECT AGAINST TAX LIENS—The Torrens system of land registration is so recent a development in the real property law of the United States that the courts have scarcely begun to scratch the surface of these statutes either by way of construction and interpretation or in pointing out their practical application to actual real estate operations.[1] A case throwing some light on our own Land Title Law[2] is *Application of Seick*,[3] in which the District Court of Appeal construed as mandatory and not merely directory the seventy-seventh section which declares that notice of tax sales must be given to the registrar of titles within five days. It was held that failure to comply with this section made the sale absolutely void. The court also said, though obiter dictum, that the tax lien itself was not disturbed and the collector might enforce it by going through the forms of a new sale.

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[18] Supra, n. 5, at 440.
[19] Supra, n. 1, at 459.
[20] Supra, n. 13.
[21] Hibernia Sav. etc. Soc. v. Dickinson, supra, n. 4, at 622; Andrews v. Robertson, supra, n. 5, at 438; Dutton v. Locke-Paddon, supra, n. 13.
[22] L. R. A. 1917C 592, note.

[1] See generally, L. R. A. 1916D 14, note. See as to California, A. M. Kidd, The Applicability of the Torrens Act in California, 7 California Law Review, 75.
[2] Cal. Stats. 1915, p. 1932.
[3] (Feb. 26, 1920) 31 Cal. App. Dec. 609, 189 Pac. 314.